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) Case Nos. 9301005925, 9409006113 and  
) 9509006729

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### ) Hearing Examiner's Decision

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Theresa Nordholm ("Nordholm") filed verified complaints with the Montana Human Rights Commission on May 25, 1993 (No. 9301005925), September 21, 1993 (No. 9409006113) and October 24, 1994 (No. 9509006729), alleging employment discrimination and retaliation. She claimed A.W.A.R.E., Inc. ("AWARE") chose her for demotion because of her sex and her age. She claimed that after she accepted the lower paying job, AWARE treated her less favorably and fired her in retaliation to her discrimination complaints. The Commission certified her three complaints for a contested case hearing on August 29, 1995.

The parties appeared for hearing on August 13, 1996, in Anaconda, Montana. Nordholm was present with her attorney, Edmund F. Sheehy, Jr., Cannon & Sheehy. AWARE's designated representative, Larry Noonan, Executive Director, ("Noonan") was present with AWARE's attorneys, Joseph C. Connors, Sr., and Joseph C. Connors, Jr., Connors Law Firm. Witnesses were excluded on charging party's motion.

Witnesses testifying and exhibits offered are listed in the witness and exhibit dockets attached to this decision.

The hearing concluded on August 16, 1996. The parties filed their respective written closing arguments on September 3, 1996. Nordholm filed a memorandum regarding the hearing examiner's decision in *Campbell v. A.W.A.R.E., Inc.*, H.R.C. Case No. 9401006058, on September 13, 1996.

## II. ISSUES<sup>1</sup>

The dispositive issue on both discrimination and retaliation claims is whether the business reasons articulated by AWARE were pretextual. Pertinent damages issues are discussed in the opinion section of this decision.

## III. FINDINGS OF FACT

1. AWARE was (and is) a Montana corporation, doing business in this state. AWARE provided a variety of services to clients with developmental disabilities, including work training and experience, residential care and life-skill training. AWARE's customers were state and federal agencies who funded the services delivered by AWARE to the clients. Without the continued support of these agency customers, AWARE could not survive.

2. AWARE encountered serious financial difficulties in 1992. Because of the financial difficulties, Noonan sought help from AWARE's customers, the government agencies. Two of the major state agencies, the Department of Social and Rehabilitation Services and the Department of Family Services of the State of Montana, conducted an audit or financial review of the records of AWARE, in December of 1992 and January of 1993.

3. Walt Berry, Audit Manager of the Audit and Compliance Bureau, wrote the report on AWARE's financial condition. Berry concluded that by the end of fiscal year 1993, AWARE would owe at least \$107,300.00 more than its net revenues. Berry believed AWARE could reduce expenses but not services, and overcome the projected deficit.

4. The agencies had a vested interest in AWARE's survival. If AWARE ceased operations, the agencies would have to find new providers for the displaced clients. On January 21, 1993, the directors of the two agencies wrote to AWARE requiring that immediate actions to restructure debt and reduce expenditures be taken. The directors gave AWARE until February 8, 1993, to present a plan to balance its budget without adverse impact on the clients. The agencies did not tell AWARE how to balance its budget. They did require that AWARE do so without reducing either the ratios of direct care staff to clients or cutting direct care salary levels below agency minimum requirements.

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<sup>1</sup> The full issue statement appears at pages 9-11 of the final prehearing order.

1           5. Noonan developed a plan in response to the requirements of the agencies. The plan  
2 was presented to the agencies on February 9, 1993. After further conferences, the agencies  
3 agreed that the plan was acceptable.<sup>2</sup> AWARE implemented the plan.

4           6. As part of the plan, Noonan eliminated four positions held by AWARE employees.<sup>3</sup>  
5 These four jobs, Noonan believed, were not necessary to satisfy the agency requirements for  
6 direct care, and other employees could assume the duties of the eliminated jobs. Nordholm  
7 held one of the four jobs eliminated by Noonan.

8           7. Of the four employees whose jobs were eliminated, three were over 40 years old  
9 and three were women, including Nordholm (d.o.b. 7-2-52). AWARE effectively demoted  
10 three of these four employees. They were offered other employment with AWARE, at reduced  
11 wages and/or hours. AWARE simply fired the fourth employee, a woman under 40.

12           8. The job Nordholm held in February of 1993 had been called "Service and Support  
13 Coordinator," "Nutritionist/Hab Tech" and "Hab Tech II." Her salary was \$10.00 per hour,  
14 and she worked 40 hours per week. Her job duties included buying groceries and supplies for  
15 the AWARE group homes in Anaconda and Butte, taking group home clients to doctor and  
16 dentist appointments, setting up the diets of group home clients, and taking clients shopping.  
17 She did not have fixed hours. She was free to perform her job duties where and when it was  
18 convenient and appropriate.

19           9. Nordholm performed her job satisfactorily. AWARE took no disciplinary action  
20 against her. AWARE gave her no documented warnings regarding sub-standard job  
21 performance. Noonan testified that he "wanted more" from Nordholm, a "higher" level of  
22 performance. He claimed to have felt that an employee at the top end of the salary scale of  
23 AWARE should be delivering a more "professional" repertoire of services. But there was no  
24 evidence that her job performance was less than acceptable.

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26           <sup>2</sup> Some changes to the plan were required, but the changes are not relevant to this case.

27           <sup>3</sup> Under the plan, hours or wages were cut for other employees of AWARE. The exact identities  
28 of all of the employees with reduced hours or wages was not established. Categories of employees  
(such as "Child Care Worker I," in the Butte group homes) received cuts. Individual employees,  
including Noonan, had either hours or wages cut.

1           10. On February 10, 1993, AWARE notified Nordholm that her position would be  
2 eliminated, effective February 23, 1993. AWARE offered her a choice between two direct  
3 care positions: a night shift position in a group home in Butte, or a weekend position in the  
4 intensive care group home in Anaconda. Each position paid \$6.00 per hour. The Anaconda  
5 position was for 32 hours a week instead of 40, with the hours specifically scheduled for  
6 Saturdays and Sundays. The Butte position required either extensive daily travel to work, or a  
7 change of residence to Butte. On February 24, 1993, Nordholm accepted the weekend job in  
8 Anaconda, as a Hab Tech I at the intensive adult group home. AWARE classified her as a  
9 probationary employee, despite her years of employment with the corporation.<sup>4</sup>

10           11. AWARE demoted Kathy McGee, a probationary employee who held that weekend  
11 job, to substitute status. McGee was also a woman over 40. She became the fourth "demoted"  
12 employee under the AWARE plan.

13           12. Three of the four "demoted" employees remained employed by AWARE.<sup>5</sup> By  
14 September of 1993, Nordholm was the only one of the three who had not recovered the wages  
15 and hours taken away under the plan. Her probationary status would normally have lasted six  
16 months. She did not have any reasonable prospect of rapidly recovering the wages and hours  
17 taken away under the plan.

18           13. AWARE's financial plan did not force Noonan to eliminate Nordholm's job.  
19 AWARE could either included her job within "direct care" or defined it out of "direct care"  
20 without objection from the agencies. Just as her functions were reassigned to others, AWARE  
21 could have reassigned the job functions of others to her.<sup>6</sup> Nordholm's job duties were not  
22 uniquely superfluous. Nordholm was not uniquely less qualified or less fit to provide direct  
23 care services to AWARE clients than employees who were retained in their existing jobs.

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25           <sup>4</sup> Nordholm had worked for AWARE since March of 1990. She continuously held various part-  
26 time or full-time positions from that date forward.

27           <sup>5</sup> The demoted employee who left AWARE was the office manager, Marge Campbell, who had  
28 refused a lower paying job when her position was eliminated.

<sup>6</sup> Nordholm's previous experience at AWARE included direct care work with clients such as job  
training, group home work and supervision of direct care work.

1 Nordholm also had more seniority than employees who were retained in their existing jobs.

2 14. Nordholm believed she had been wrongly demoted, and accepted her week-end job  
3 "under protest." She believed she had been promised the next available opening at AWARE,  
4 which she did not receive. She was hostile and uncooperative with: (1) Robin Ferguson, her  
5 immediate superior during the weekend shifts; (2) Mary Spehar, Ferguson's supervisor, the  
6 program manager of both Anaconda group homes (including the intensive care group home  
7 where Nordholm was now working); (3) Ken Groggel, Spehar's supervisor, the program  
8 director of AWARE group homes generally; and (4) Noonan himself.

9 15. Nordholm took accrued sick leave before her first shift at her new job. She did not  
10 cooperate with AWARE's efforts to discover why she required sick leave and when she would  
11 return to work.<sup>7</sup> After she did return, she refused to attend staff meetings scheduled outside of  
12 her working hours, even when ordered to attend by Ferguson, her supervisor. She argued  
13 with Ferguson, and complained to other staff members about the unfair treatment she had  
14 received. She resisted and delayed obtaining and providing proof of certifications required for  
15 her job (such as First Aid/CPR certification).

16 16. During her employment at the intensive care group home, AWARE gave Nordholm  
17 multiple written warnings and suspensions as a result of her attitude and behavior. She  
18 contested the warnings and the suspensions, by filing grievances and by filing the second of her  
19 three Human Rights Commission complaints. Nordholm has always contended that none of the  
20 adverse actions against her were justifiable.

21 17. Nordholm was not entirely at fault in the multiple confrontations she had with  
22 AWARE. AWARE began documenting Nordholm's conduct as soon as she gave notice she  
23 was accepting the Hab Tech position "under protest." Many of the items which became part of  
24 AWARE's litany of complaints about Nordholm were minor matters (such as not signing the  
25 acknowledgement for the Employee Handbook). Even after settling some of the disputes with  
26 Nordholm, AWARE continued to cite her actions in those settled disputes as the basis for

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28 <sup>7</sup> Her accrued sick leave was paid at her higher, former, wage. AWARE realized reduced savings from her job elimination. Noonan could not have anticipated the immediate use of the sick leave, so this reduced savings is irrelevant to AWARE's motivation in selecting Nordholm for "demotion."

1 further disciplinary action against her.

2 18. Nordholm was sullen, uncooperative, disobedient, disruptive and insubordinate.<sup>8</sup>  
3 AWARE followed the disciplinary steps of its Handbook, as interpreted and applied to an  
4 employee whose 32 hour shift consisted of 2 long days each weekend. Because Nordholm  
5 believed she had been wrongly demoted, she viewed each criticism, each directive about her  
6 conduct, each disciplinary act, to be a further wrongful attack upon her. She disputed them all  
7 and fought them all. She disobeyed direct instructions from her supervisors, and generally  
8 carried on a running feud with management and the organization. Her intractability made her a  
9 serious problem for her supervisors, and affected the clients in the group home, who were  
10 present for some of the conflicts between Nordholm and other staff members.

11 19. Nordholm went so far as to disobey directions from her supervisor, Ferguson, even  
12 when the disobedience directly affected care to clients. In one instance, she ignored  
13 "suggestions" from Ferguson to encourage an client to leave the AWARE van and join others  
14 on an day trip in a park. As a result of this conduct, the client remained in the van, with the  
15 doors closed, while the other clients continued the trip.

16 20. The extraordinarily disruptive impact of Nordholm's attitude and behavior can be  
17 seen from Ferguson's unwillingness to give a direct order to Nordholm to help the client out of  
18 the van. Ferguson decided to leave the client in the closed van for a prolonged period of time,  
19 to verify whether Nordholm was truly willing to prejudice the client in order to spite Ferguson.  
20 The conflict between the two, which was largely caused by Nordholm's attitude and behavior,  
21 rendered both employees less capable of caring for the clients. The ultimate impact of the  
22 conflict was visited upon the clients with developmental disabilities living in the group home.

23 21. AWARE fired Nordholm on April 29, 1994. AWARE did not act with perfect  
24 even-handedness, but the actions taken against Nordholm after her demotion, including her  
25 discharge, were for legitimate business reasons. AWARE fired Nordholm because of her  
26 conduct at work, not because she engaged in protected activity. AWARE did not fire  
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28 <sup>8</sup> Perhaps the simplest example of her conduct can be heard on Exhibit CP 39, an audiotape of, among other things, the performance evaluation of Nordholm held on October 1, 1993.

1 Nordholm in retaliation for HRC complaints she filed.

2 22. On March 31, 1994 and April 29, 1994, Nordholm obtained hepatitis shots for  
3 which she expected AWARE to pay. Nordholm followed her understanding of AWARE's  
4 policy about how to get those shots. That understanding, based upon the method one of the  
5 supervisors (Spehar) had used over a year before to get the same shots, was incorrect. The  
6 method employees were to use to get the shots at AWARE's expense had been changed.  
7 Nordholm could have and should have checked when she got the shots, to verify how to obtain  
8 the shots at AWARE's expense. AWARE is not liable for the costs of the shots. AWARE's  
9 refusal to pay for the shots was based upon a valid business reason.

10 23. Nordholm lost wages as a result of her demotion. From February 23, 1993,  
11 through April 29, 1994 (400 days), she would have worked 57.143 weeks at her former job,  
12 with a gross salary of \$400.00 per week. She would have earned \$22,857.20, and retained the  
13 sick leave she utilized after her demotion.<sup>9</sup> She was paid the sick leave, which she would have  
14 otherwise received after her discharge. Her loss was \$22,857.20.

15 24. The work available to Nordholm through AWARE, excluding her sick leave,  
16 consisted of 51 32-hour weekends of work (May 8-9, 1993, through April 23-24, 1994) at  
17 \$6.00 per hour. She had the opportunity to earn \$9,792.00. In addition, monthly group home  
18 staff meetings were ordinarily held on weekdays. Nordholm refused to attend these meetings  
19 for which she would have been paid, until October of 1993. An additional two hours's wages  
20 (\$12.00) each month (May of 1993 through September of 1993) adds \$60.00 to what she could  
21 have earned.

22 23. Nordholm's loss as of April 29, 1994, was \$13,005.20. Interest at 10% per  
23 annum, or \$3.56 per day, on this loss from April 29, 1994, through November 25, 1996, is  
24 \$3,357.08.

#### 25 IV. OPINION

26 Selection of Nordholm's job for elimination was unlawful discrimination.

27 \_\_\_\_\_  
28 <sup>9</sup> The parties disagree about whether Nordholm was genuinely unable to work during the period  
she was on sick leave, in February, March and April of 1993. There is no genuine dispute that but  
for her demotion, she would not have taken this sick leave.

1 Nordholm proved a prima facie case of employment discrimination:

2 (1) She proved protected class status,

3 (2) satisfactory job performance,

4 (3) adverse impact of employer action and

5 (4) a causal connection between protected class status and the adverse action.

6 *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).<sup>10</sup>

7 The first three elements of Nordholm's prima facie case were clearly proved. She was  
8 a female over 40. She was performing her job satisfactorily. Her job was eliminated and she  
9 was offered a lower paying job with fewer hours and much less flexibility.

10 Proof of the causal connection between protected class status and the adverse action is  
11 often difficult. Few employers will confess to illegal discriminatory motives. Few will  
12 document an illegal discriminatory motive in the business records of the company. Under the  
13 *McDonnell Douglas* standards, the charging party's prima facie case creates, through indirect  
14 or circumstantial evidence, "an inference that an employment decision was based on a  
15 discriminatory criterion illegal under the act." *Teamsters v. United States*, 431 U.S. 324, 358  
16 (1977).

17 The elements of a prima facie case vary according to the nature of the alleged  
18 discrimination. *McDonnell Douglas*, 411 U.S. at 804, n. 13. In each case the four elements  
19 serve the critical function of "eliminat[ing] the most common nondiscriminatory reasons" for  
20 the employer's adverse action. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248,  
21 254 (1981). The generic "causal connection" statement of the fourth step is satisfied if the  
22 most common nondiscriminatory reasons for the employer's action have been eliminated. The  
23 inference of discriminatory intent arises from the absence of such nondiscriminatory reasons.

24 Nordholm proved a causal connection between her age and sex and the adverse action.  
25 Three of the four employees whose jobs were eliminated were older than 40. Nordholm had  
26 worked for AWARE for 13 years. She alone, among the demoted employees who remained  
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28 <sup>10</sup> *Johnson v. Bozeman School Dist.*, 226 Mont. 134, 734 P.2d 209 (1987); *European Health Spa v. Human Rights Comm'n*, 212 Mont. 319, 687 P.2d 1029 (1984); *Martinez v. Yellowstone Co. Welfare Dept.*, 192 Mont. 42, 626 P.2d 242 (1981).

1 with AWARE, did not recover her previous levels of wages and quickly. Nordholm was  
2 placed *at the time of her demotion* in a job where she would not soon be able to work back up  
3 to the income, hours and flexibility she had lost. No valid distinction between Nordholm and  
4 other employees was proved to explain this disparate treatment.

5 In addition, Nordholm was singled out for criticism by AWARE virtually from the day  
6 she accepted the demotion. Although as time passed, Nordholm's hostile and confrontational  
7 behavior made her a suitable target for concern, comment and disciplinary action, her initial  
8 treatment supported her original claim of discrimination.

9 Once Nordholm's prima facie case was established, the burden was upon AWARE to  
10 present a legitimate business reason for the adverse action against her. *McDonnell Douglas*,  
11 *op. cit.* The business reasons presented by an employer to justify its RIF decisions are not  
12 required to be well-advised, but are required to be true. *Donaldson v. Merrill Lynch & Co.*,  
13 794 F.Supp. 498, 505 (S.D.N.Y. 1992). AWARE had a business reason for reducing its labor  
14 force. AWARE had a genuine financial crisis. Reducing forces was part of a reasonable and  
15 proper response to that crisis.

16 Nordholm challenged AWARE's business reason, arguing Noonan offered no credible  
17 explanation of why *Nordholm*, in particular, was selected to be "RIF"ed or laid off. If Noonan  
18 chose her for reasons other than her age and sex, then AWARE needed to demonstrate the  
19 reasons why she was singularly appropriate for demotion.

20 The Montana Supreme Court has succinctly stated the test for pretext:

21 "Once the defendant has produced a legitimate reason in support of its decision  
22 not to rehire, the plaintiff then must show that the defendant's reasons are in fact a  
23 pretext. *McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. at 1824; Martinez, 626 P.2d  
24 at 246. This is the third and last tier of proof required in *McDonnell Douglas*. As  
25 stated in *Burdine*, proof of the pretextual nature of the defendant's proffered reasons  
26 may be either direct or indirect:

27 'She may succeed in this either directly by persuading the court that a  
28 discriminatory reason more likely motivated the employer or indirectly by  
showing that the employer's proffered explanation is unworthy of credence.'

1           *Burdine*, 450 U.S. at 256, 101 S.Ct. at 1095.

2           Ultimately, the plaintiff must persuade the court by a preponderance of the  
3           evidence that the employer intentionally discriminated against her.

4           *Crockett v. City of Billings*, 234 Mont. 87, 761 P.2d 813, 817-18 (1988).

5           AWARE did not prove a true reason for demoting Nordholm which relied on some  
6           unique aspect of either her job or herself aside from age and sex. AWARE did not  
7           satisfactorily explain why this employee was defined *out* of "direct care" rather than others  
8           who were male, younger or both. AWARE did not satisfactorily explain why it demoted  
9           Nordholm to a job in which she would not soon recover her better wages, hours and flexibility.

10          AWARE proved that in its financial distress, a legitimate response was to reduce  
11          employee salary costs. The Commission generally will not sit in judgment and second-guess  
12          decisions about lay-offs when financial constraints reasonably require lay-offs. But when the  
13          lay-offs visit a substantially disparate burden upon protected class employees, the reasons for  
14          laying off the aggrieved party as opposed to some other employee must be demonstrated.

15          AWARE faced a genuine financial crisis--that is not disputed. But AWARE in crisis  
16          still was not free to pick women, or older employees, to bear the brunt of the cuts. AWARE  
17          failed to prove reliance upon gender and age-neutral factors in selecting Nordholm's job for  
18          elimination. AWARE's legitimate business reason is therefore a pretext because it does not  
19          explain why Nordholm in particular was subjected to the adverse action.

20          AWARE did not retaliate against Nordholm, and this limits her damages.

21          Nordholm established a prima facie case of retaliation by proving that adverse action  
22          was taken against her while her Human Rights Commission complaints were pending.  
23          24.9.803(2) A.R.M. But the overwhelming evidence of Nordholm's inappropriate conduct  
24          after her demotion established a legitimate business reason for disciplining and ultimately firing  
25          her. Had she pursued her legal remedies and performed her job, AWARE could not legally  
26          have subjected her to adverse action after her demotion. But she provided AWARE with  
27          multiple bases for taking action against her, on an escalating disciplinary scale, including the  
28          final act of firing her.

          AWARE had a valid legal basis for the disciplinary actions taken against Nordholm.

1 Thus, her damages are limited to the difference between the wages she would have earned in  
2 her old job and the wages she could have earned in her new job had she not been suspended  
3 and had she not skipped staff meetings. The time over which she lost this income extended  
4 only to the date of her discharge. AWARE fired her for good and sufficient reasons. The  
5 nondiscriminatory firing ended the harm which proximately resulted from AWARE's illegal  
6 discrimination against her. Since she brought about her firing by her own acts, her loss of  
7 wages thereafter was not harm for which AWARE was liable.

8 Nordholm's Sick Leave Is Not Time During Which She Could Have Mitigated Damages

9 The duty to mitigate requires the injured party to act reasonably and prudently to limit  
10 damages. *Harrington v. Holiday Rambler Corp.*, 176 Mont. 37, 575 P.2d 488 (1978).  
11 Clearly, had Nordholm kept her former job, she would not have taken sick leave in February,  
12 March and April of 1993. She would then have kept her accrued sick leave "banked" with the  
13 employer, instead of receiving it in 1993.

14 AWARE distrusted her need for sick leave in 1993, and at hearing still suggested that  
15 Nordholm was not actually unable to work. AWARE did not prove that Nordholm took sick  
16 leave improperly. AWARE did not establish that a reasonable and prudent employee would  
17 have continued to work under Nordholm's circumstances. Therefore, Nordholm is not  
18 considered, in determining damages, to have had the opportunity to earn wages while she was  
19 on sick leave. For this reason, the wages she could have earned in her weekend position are  
20 not considered to start until she came back from sick leave.

21 Nordholm's alleged "misconduct" regarding outside employment was not proved.

22 AWARE attempted to establish misconduct, alleging Nordholm worked the same hours  
23 for AWARE and another employer. The evidentiary disputes which arose about the records  
24 AWARE obtained from Nordholm's other employer need not be resolved. Noonan admitted  
25 on the witness stand that the evidence presented at this hearing was not enough to justify firing  
26 Nordholm for this alleged misconduct. If enough evidence was not adduced for Noonan to fire  
27 Nordholm, then AWARE failed to prove this misconduct.

1                                    The Unemployment Claim Is Irrelevant

2            Since AWARE was justified in disciplining and firing Nordholm for her conduct at  
3 work, other misconduct after her demotion is without significance. The adverse decisions in  
4 Nordholm's unemployment claim are either irrelevant or cumulative.<sup>11</sup> Thus, the legal issue of  
5 whether those decisions against Nordholm should be given collateral estoppel weight is beyond  
6 the scope of this case.

7                                    Emotional distress damages are not appropriate.

8            Once a violation has been proved under state or federal civil rights statutes, then  
9 emotional harm is compensable. Nordholm was required to prove first that distress,  
10 humiliation, embarrassment or other emotional harm actually occurred. Second, she had to  
11 prove that she suffered this harm as a proximate result of the unlawful conduct of the  
12 respondent.<sup>12</sup> Compensable emotional harm resulting from a civil rights violation can be  
13 established by the testimony of the injured party alone, *Johnson v. Hale*, 942 F.2d 1192 (9th  
14 Cir. 1991), and, in some circumstances, can be inferred from the circumstances.<sup>13</sup>

15            Nordholm acted out her emotional distress directly upon her employer. There was  
16 considerably less than substantial evidence of compensable emotional harm. Including in the  
17 lost income award the period of time during which Nordholm was on sick leave is proper.

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19            <sup>11</sup> Whether the unemployment decisions were based upon the same facts advanced in this case,  
20 or other evidence of misconduct, is likewise irrelevant.

21            <sup>12</sup> See, among others: *Carey v. Phipps*, 435 U.S. 247, 264 at n. 20 (1978) (42 U.S.C. 1983  
22 action, denial of voting rights); *Carter v. Duncan-Huggins Ltd.*, 727 F.2d 1225 (D.C. Cir. 1984)  
23 (42 U.S.C. 1981 employment discrimination); *Seaton v. Sky Realty Company*, 491 F.2d 634  
24 (7th Cir. 1974) (42 U.S.C. 1982 housing discrimination based on race); *Brown v. Trustees of*  
25 *Boston University*, 674 F.Supp. 393 (D.C. Mass. 1987) (unlawful denial of tenure opportunity,  
based on sex); *Portland v. Bureau of Labor and Industry*, 61 Or.Ap. 182, 656 P.2d 353 (1982),  
*affirmed* 298 Or. 104, 690 P.2d 475 (1984) (sex-based employment discrimination); *Hy-Vee Food*  
*Stores v. Iowa Civil Rights Comm.*, 453 N.W.2d 512, 525 (Iowa, 1990) (sex and national origin  
discrimination).

26            <sup>13</sup> *Carter v. Duncan-Huggins, Ltd.*, *op. cit.*; *Seaton v. Sky Realty Co.*, *op. cit.*; *Buckley Nursing*  
27 *Home, Inc. v. MCAD*, 20 Mass.Ap.Ct. 172 (1985) (finding of discrimination alone permits inference  
28 of emotional distress as normal adjunct of employer's actions); *Fred Meyer v. Bureau of Labor &*  
*Industry*, 39 Or.Ap. 253, 261-262, rev. denied, 287 Ore. 129 (1979) (mental anguish is direct and  
natural result of illegal discrimination); *Gray v. Serruto Builders, Inc.*, 110 N.J.Sup. 314 (1970)  
(indignity is compensable as the "natural, proximate, reasonable and foreseeable result" of unlawful  
discrimination).

Enhanced recovery for emotional distress is not appropriate in this case.

## **V. CONCLUSIONS OF LAW**

1. AWARE illegally discriminated against Nordholm, by selecting her based upon sex and age as an employee to be demoted and offered a job with a lower wage, fewer hours and less flexibility. §49-2-303 MCA.

2. Nordholm lost \$13,005.20 in wages as a proximate result of this illegal discrimination. §49-2-506(1)(b) MCA.

3. AWARE owes Nordholm \$3,357.08 in prejudgment interest at 10% per annum through November 25, 1996, and continuing at \$3.56 per day until final order.

4. AWARE did not retaliate against Nordholm by taking adverse action against her after she agreed to accept the weekend position in February of 1993. §49-2-301 MCA.

5. The circumstances of the discrimination do not mandate particularized affirmative relief.

## **VI. ORDER**

1. Judgment is awarded in favor of charging party and against respondent in the matter of Theresa Nordholm's complaints that respondent, A.W.A.R.E., Inc., discriminated against her because of her age and sex by eliminating her job and offering her a position which paid less, had fewer hours and less flexibility, in February of 1993. §49-2-303 MCA.

2. Respondent is ordered to pay \$16,362.28 to charging party for lost wages caused by the described illegal discrimination. This sum includes prejudgment interest through November 25, 1996.

3. Respondent is ordered to pay prejudgment interest to charging party on the lost wages portion of the award in paragraph 2, at 10% per annum, \$3.56 per day from November 26, 1996, until the final order issues, and thereafter interest upon the judgment at \$3.56 per day until paid.

4. Respondent is ordered not to violate any of the rights of its employees as protected under the Montana Human Rights Act.

5. Judgment is awarded in favor of respondent and against charging party in the matter

1 of Theresa Nordholm's complaints that respondent, A.W.A.R.E., Inc., discriminated against  
2 her by retaliation in disciplining her and firing her because she complained to the Montana  
3 Human Rights Commission about respondent's illegal discrimination. §49-2-301 MCA. Her  
4 complaints of discrimination are dismissed with prejudice.

5 Dated: November 26, 1996.

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Terry Spear, Hearing Examiner  
Montana Human Rights Commission  
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